Supreme Court, U.S
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No. 02-1623

In The

Supreme Court of the United States

TULARE COUNTY, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*, NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.* BILL LOCKYER, ATTORNEY GENERAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF

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I. The Issues Presented By Tulare County's Petition Merit Review By This Court.

Federal respondents' principal argument is that, at most, this case represents an isolated incident of the misapplication of an established pleading rule and because the court of appeals did not announce any new rule of law governing the pleading of federal claims, the outcome of this case will not affect the disposition of future cases. Federal respondents' brief at 8. This argument fails for two interrelated reasons. First, the record demonstrates that the court of appeals ignored the notice pleading standard of Fed. R. Civ. Pro. 8 and *sub silentio* applied a heightened pleading standard when it dismissed Tulare County's complaint for lack of specificity. This is in direct conflict with *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002). Second, the ruling of the district court and the ruling of the court of appeals below are *radical departures from the accepted and usual course of judicial proceedings* involving the application of Rule 8 and Rule 12(b)(6) and therefore call for an exercise of this Court's supervisory power. Either of these reasons is sufficient to justify granting the petition.

The gravamen of Tulare County's complaint is that the President acted outside the scope of his authority under the Antiquities Act because he proclaimed a monument grossly in excess of the Act's express requirement that all monuments "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected" and a monument which far from protecting any objects, subjects them to a significantly increased risk of catastrophic fire. The complaint alleges that neither the President nor any subordinate officer of the Executive Branch ever made any assessment of the proper size of the monument measured against this standard (Petition, App. 78-App. 82 ¶¶ 131-153) and that the restrictions in the Proclamation against commercial timber sales significantly increase the risk of catastrophic fire and thus the danger to the Giant Sequoia trees and/or

other objects which may be within the vast monument area. Petition, App. 83-App. 84 ¶¶ 154-160. Under Rule 12(b)(6), these factual allegations, and all others in the complaint, must be taken as true for purposes of a motion to dismiss. The courts below ignored this principle and dismissed this case at the pleading stage without requiring the federal defendants to present so much as a single declaration in opposition to the allegations of the complaint. In doing so these courts became the first courts in the more than 80-year history of litigation challenging the creation of national monuments pursuant to the Antiquities Act to dismiss such a challenge at the pleading stage. Accordingly, this is a case of historic importance worthy of certiorari.

Even a cursory reading of the complaint demonstrates that contrary to the statement issued by the panel of the court of appeals upon denial of the petition for rehearing *en banc*, that panel obviously applied a heightened pleading standard, albeit *sub silentio, in contravention of this Court's decision in Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002). If the court of appeals' *radical departure from the well-established standard of notice pleading* is allowed to stand in this case, the federal courts will be free to do this again in response to future Antiquities Act challenges. The Federal Rules of Civil Procedure do not permit such shortcuts regardless of how administratively convenient it may seem to a court to summarily dispose of a challenge to Presidential action in this manner.

As a practical matter, it will rarely if ever be possible for a plaintiff without knowledge of the specific objects to be protected and any explanation of how the boundaries of the monument were actually drawn to allege specifically in its complaint those precise areas of the monument unnecessary for the protection of those unspecified objects. Only on cross-motions for summary judgment or at trial can this level of specificity be brought before the court. Tulare County has been denied this fundamental opportunity.

If the district court's dismissal of the complaint in this action is allowed to stand under either the rationale of the district court (that the statements in the Proclamation are taken as true despite directly conflicting allegations in the complaint) or under the rationale of the court of appeals (that a complaint must allege with specificity all areas within a monument not necessary for the protection of whatever objects the President may have had in mind) then in the future, as a practical matter, there will no longer be any effective judicial review of presidential compliance with the express limitations of the Antiquities Act.

II. Tulare County Is Not Making An Abuse Of Discretion Claim.

The federal respondents characterize Tulare County's complaint as alleging that the President abused his discretion under the Act (federal respondents' brief at 9-10); however, the plain language of the Act and the allegations of the complaint demonstrate that this is not true. Of course, Tulare County does not dispute that the Act provides the President with broad discretion to determine, as an initial matter, whether or not to declare a national monument. Petition at 2. Thus, for example, no plaintiff would be able successfully to file a suit under the Act seeking a court order requiring the President to exercise his discretionary power to declare a monument, no matter how deserving such a monument might seem. From this, however, it does not follow that once the President has decided to declare a monument under the authority delegated to him by Congress, his compliance with the mandatory limitations of the Act also are not subject to judicial review. Put differently, once the President has decided to exercise his discretion to declare a monument, the Act *requires* that the President comply with specific standards, including that the monument protect identifiable objects of historic or scientific interest, and that the geographic limits of the monument "in all cases shall be

confined to the smallest area compatible with the proper care and management of the objects to be protected." Petition at 2. Federal respondents do not, nor could they, contend that compliance with these standards is optional or subject to the President's "discretion." Yet, it is precisely the President's failure to abide by these mandatory requirements (and not any putative abuse of discretion) that Tulare County challenges in its complaint.

Counts I, II, and III of the complaint read *reasonably and collectively* allege that the 327,769-acre monument is not the "smallest area compatible with the proper care and management of the objects to be protected" and that neither the President nor his subordinates within the Executive Branch have identified or located the particular objects that must be located so that the proper size of the monument may be established. Petition, App. 78-App. 82 ¶¶ 131-153. Count IV alleges that far from protecting any purported objects within the monument, the Proclamation actually significantly increases the risk of harm to the monument and its objects by increasing the risk of catastrophic fire in the monument area and strictly limiting the construction and use of roads and trails which are necessary for fire fighting. Petition, App. 83-App. 84 ¶¶ 154-160.

In addition, the increasing threat to the monument and any objects therein from catastrophic wildfire is a demonstrated fact. As set forth in the complaint, the Manter Fire burned an area twice the size of the District of Columbia in the Sequoia National Forest, quite near the monument. Petition, App. 77-App. 78 ¶¶ 127-129. Moreover, for three months last summer and fall the McNally Fire burned an area three times the size of the District of Columbia including lands within the monument and came within a mile of one of the Giant Sequoia Groves. *See* Petition at 8. These allegations go to the very heart of the mandatory requirements of the Antiquities Act. This case is not about an alleged abuse of discretion.

III. Presidential Compliance With The Antiquities Act Is Subject To Judicial Review.

Although federal respondents appear to argue that the courts do not have jurisdiction to determine whether the President has complied with the Antiquities Act, federal respondents have not challenged the district court's and the D.C. Circuit's implicit determination that they have such jurisdiction. Moreover, federal respondents do not identify a single case in which a court concluded that it was without jurisdiction to review the President's compliance with the Antiquities Act. In fact, as discussed in the Petition, of the six cases deciding claims under the Antiquities Act, including three decisions of this Court, none have been decided on a motion to dismiss. *See* Petition at 23-25.

When Congress wishes to preclude or limit judicial review of statutes, it must expressly do so. In the absence of any provision expressly precluding review, there is a strong presumption that Congress intended judicial review to be available. *See e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 816 (1992) (Stevens, J., concurring in part & concurring in the judgment). *See also*, *In re Cheney*, Nos. 02-5354, 02-5355, 02-5356, 2003 WL 21523362 (D.C. Cir., July 8, 2003) (Court affirmed district court's denial of motion to dismiss case challenging official acts of President and Vice President under statute that did not provide for judicial review and where Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (APA) did not apply. Court found jurisdiction under the Mandamus Act, 28 U.S.C. § 1361, a source of jurisdiction alleged in the instant case. *See* Petition, App. 50 ¶ 10). Although Congress was free to limit the scope of or entirely preclude judicial review (including non-statutory review) of actions under the Antiquities Act, it did not do so.

The government nevertheless argues that there is no statutory basis for Tulare County's claims because neither the Antiquities Act, the APA, nor any other federal statute authorizes judicial review of the President's compliance with the Antiquities Act so long as the President asserts in

the Proclamation that he has complied. Federal respondents' brief at 10. However, in *Dalton v. Specter*, 511 U.S. 462 (1994), a case relied upon by the federal respondents, this Court assumed that "even where judicial review is not available under the APA, some claims that the President violated a statute may nevertheless be judicially reviewable outside the framework of the APA." *Id.* at 474, *see also Clinton v. Jones*, 520 U.S. 681, 703 (1997). Federal respondents do not contend that the Antiquities Act is devoid of meaningful standards by which to judge whether or not in creating the Giant Sequoia National Monument the President acted within the law. To the contrary, they assert that the "statutory standards [of the Antiquities Act] meaningfully constrain the President's authority. . . ." Federal respondents' brief at 11. But if statements in the Proclamation are false, as the complaint in this case alleges, there is no meaningful constraint on the President without judicial review. Accordingly, the Court has authority to determine whether the President's conduct conformed to the requirements of the Act.[1]

In support of their contention that this Court lacks jurisdiction to decide this case on the merits, federal respondents rely on cases not involving the Antiquities Act and involving very different statutes which afford the President virtually unrestrained discretionary authority to act. For example, *Dalton v. Specter*, 511 U.S. 462 (1994), involved the Defense Base Closure and Realignment Act of 1990, in which Congress authorized the President to

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[1] Federal respondents' related suggestion that sovereign immunity bars Tulare County's cause of action (federal respondents' brief at 9) has also been rejected by this Court's holdings that sovereign immunity is no bar to suits alleging that an officer's actions are unconstitutional or beyond statutory authority because "those actions are considered individual and not sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *Dugan v. Rank*, 372 U.S. 609, 621-23 (1963).

approve or disapprove base closure recommendations in their entirety as contained in a report prepared by a Base Closure Committee. There, this Court found that the President's exercise of his unfettered discretion to simply approve or disapprove the base closure recommendations was not subject to judicial review. 511 U.S. at 476.

However, as Justice Blackmun's concurring opinion in *Dalton* makes clear, nothing in *Dalton* precludes judicial review of a claim that the President had acted outside of his statutory authority, for example by adding additional bases to the list of bases to be closed. *Id.* at 477-78 (Blackmun, J., concurring in part & concurring in the judgment).[2] In this case, Tulare County specifically alleged that the President determined the size and location of the monument without any attempt to comply with the limitations in the Antiquities Act and that the monument will not protect the putative objects. Thus, he acted outside of his statutory authority.[3]

George S. Bush & Co. v. United States, 310 U.S. 371 (1940), also does not support federal respondents' position. *George S. Bush & Co.* involved the Tariff Act of 1930, a depression-era statute which granted the President

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[2] The concurring opinion of Justice Souter, in which Justices Blackmun, Stevens, and Ginsburg joined, found that the structure of the 1990 Act at issue in *Dalton* demonstrated that Congress had specifically chosen to overcome "the strong presumption in favor of judicial review." *Id.* at 483-84 (Souter, J., concurring in part & concurring in the judgment). Nothing in the Antiquities Act suggests that Congress intended to abandon the presumption in favor of judicial review.

[3] The federal respondents' reliance on *Franklin v. Massachusetts*, 505 U.S. 788 (1992), is also misplaced. The passage from *Franklin* quoted by federal respondents relates to this Court's ruling that the President was not an "agency" within the meaning of that term in the APA and therefore the President's actions were "not reviewable for abuse of discretion under the APA." *Id.* at 801. As Tulare County does not raise an abuse of discretion claim under the APA, *Franklin's* ruling on this point has no bearing on this case.

unrestricted authority either to accept or reject recommendations for changes in tariff rates made by a Trade Commission, if in his sole judgment the recommended changes were "necessary to equalize [ ] differences in costs of production" between domestic and foreign companies. 310 U.S. at 376-77. The plaintiffs challenged the President's decision adopting rate changes recommended by the Commission on clams imported from Japan on the grounds that the Commission had used a formula by which it improperly converted invoice prices from yen to dollars. Significantly, the Court observed that the Tariff Act was silent as to the use of any such formula. *Id.* at 377-78. It was in this context that this Court ruled that it could not review the President's decision on a matter which was committed by statute to his sole judgment and concluded that "[h]ere the President acted in full conformity with the statute." *Id.* at 380.[4] Thus, unlike the Antiquities Act which imposes specific limitations on the size and scope of any national monument which may be proclaimed by the President, the Tariff Act contained no limitations on the manner in which the President was to decide whether changes recommended by the Commission were necessary to equalize differences in costs of production.

That Congress granted broad discretion to the President to approve or disapprove a particular tariff recommended by an independent commission at the height of the Great Depression in *George S. Bush* or unreviewable discretion to close military bases in *Dalton* and this Court upheld these narrow delegations of unfettered discretion

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[4] The Tariff Act, unlike the Antiquities Act, also contained a provision expressly limiting judicial review. Section 501 of the Tariff Act of 1930 limited appeals to "a question or questions of law only" (*George S. Bush*, 310 U.S. at 397 n.5), thus demonstrating that Congress intended a reduced level of judicial review which would not include any factual determinations.

lends no insight into the proper scope of a court's review of a President's actions under the Antiquities Act.

IV. The Court Has Jurisdiction To Review The Proclamation And To Grant The Relief Sought Against Lesser Executive Branch Officials.

Regardless of whether the federal courts have jurisdiction to grant relief directly against the President, this Court has recognized the propriety of reviewing the validity of Presidential directives, but granting relief against subordinate executive officers:[5]

> Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.

Franklin, 505 U.S. at 815, 112 S.Ct. at 2750 (Scalia, J., concurring in part & concurring in the judgment), *accord Chamber of Commerce v. Reich*, 74 F.3d 1332, 1328 (D.C. Cir. 1996); *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996). Federal respondents appear to concede this point in a footnote:

> The unavailability of judicial process to compel or prohibit the President's performance of an official act therefore does not provide an independent ground for dismissal of petitioners' suit or for denial of certiorari.

Federal respondents' brief at 6-7.

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[5] Plaintiffs have named the Secretary of Agriculture, the Chief of the Forest Service, the Regional Forester, and the Forest Supervisor as defendants.

V. The Antiquities Act Is Unconstitutional If It Is Impossible For A Court To "Ascertain Whether The Will Of Congress Has Been Obeyed."

The parties agree that on its face the Antiquities Act contains intelligible principles which limit the President's authority to proclaim national monuments. In addition, it seems readily apparent that the President's compliance with those intelligible principles must be subject to meaningful judicial review, otherwise these principles are meaningless and the Antiquities Act is an unconstitutional delegation of Congress' power under the Property Clause of the Constitution. *Yakus v. United States*, 321 U.S. 414, 426 (1944). The Proclamation asserts, without more, that the monument is the smallest size required by the Antiquities Act. The complaint in this case alleges, among other things, that this assertion in the Proclamation is false. A mere facial review of the Proclamation as conducted by the district court cannot provide the requisite assurance that "the will of Congress has been obeyed."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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